

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-1372

ORIGINAL

To be argued by
LAWRENCE K. FEITELL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

REGINALD SATTERFIELD,

Defendant-Appellee.

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLEE

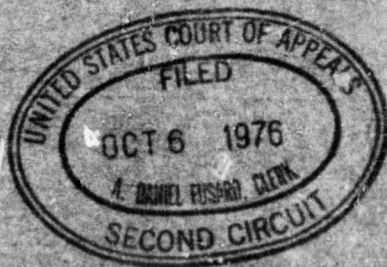
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellant,

-against-

REGINALD SATTERFIELD,

Defendant-Appellee.
-----X

BRIEF FOR APPELLEE SATTERFIELD

PRELIMINARY STATEMENT

The United States appeals, pursuant to Title 18, United States Code, Section 3731, from two pre-trial orders filed on July 9, 1976, and July 23, 1976, by the Honorable Whitman Knapp, United States District Judge for the Southern District of New York, suppressing three statements of appellee as evidence at trial.

Indictment 76 Cr. 376, filed on April 14, 1976, charged Reginald Satterfield, Ronald Weston and James Byrd with one count of conspiring to violate the federal narcotics laws, in violation of Title 21, United States Code, Section 846, and with three counts of possession with intent to distribute heroin, in violation of Title 21, United States Code, Sections

841 (a)(1) and 841(b)(1)(A).

Prior to trial, Satterfield moved to suppress as evidence against him three statements made after his arrest and indictment. Following a hearing held on June 30, 1976, the District Court, in a written memorandum opinion, granted Satterfield's motion (App. 158).^{*} In response to a motion for rehearing filed by the Government, the District Court filed a second written memorandum (App. 186), again concluding that the three statements must be suppressed, but limiting its decision to the main grounds set forth in its memorandum which emphasized the absence of counsel after appellee's indictment. On September 16, 1976, after the Government had printed its appendix, Judge Knapp circulated a letter slightly altering the final language in his main memorandum but in no way changing its meaning or impact. Copies of his letter will be handed up on the argument.

INTRODUCTION

This appeal by the Government raises the question whether a federally indicted defendant, who has received Miranda warnings, may properly be interrogated by arresting officers and the federal prosecutor in the absence of counsel both prior to being arraigned upon his indictment before a magistrate, as

^{*} References are to the appellant's appendix.

well as after such arraignment at which arraignment the defendant was denied an assignment of counsel.

In the instant case the appellee, Reginald Satterfield, was interrogated by federal officers and an Assistant United States Attorney following his arrest upon the indictment herein. Satterfield was brought before a United States Magistrate five (5) hours later, at which time he requested - but was denied - the assignment of counsel. Satterfield was without means to retain an attorney. Upon his release that day, Satterfield was invited by a Drug Enforcement Administration officer to return to Drug Enforcement Administration headquarters to "cooperate" further. Being unable to afford counsel, appellee did visit Drug Enforcement Administration headquarters after an intervening weekend and, after further Miranda warnings, gave additional incriminatory statements which were tape recorded.

Substantial testimony at the suppression hearing indicated Satterfield's conceded emotional state, agitation and weeping, at the time of his arrest and thereafter. Likewise, there was no issue with respect to Satterfield's rejected demand for assigned counsel during the proceedings before the Magistrate, nor the fact that Satterfield had explicitly turned to his interrogators for advice on the necessity of his securing

an attorney. This inquiry was fobbed off and ignored by the Drug Enforcement Administration agents (Decision of Judge Knapp, A164).

Judge Knapp, upon an evaluation of the considerations underlying the decision in Massiah v. United States (1964), 377 U.S. 201, granted Satterfield's motion to suppress his post-indictment statements (A158-A165; A186-A187). In so doing, Judge Knapp realistically noted the great importance of counsel to an indicted defendant in helping him to deal with the Government where a program of "cooperation" seems possible. Judge Knapp quite correctly concluded that a waiver of counsel - if one should be ever allowed by an indicted defendant acting alone - is to be on conditions making it abundantly clear to him, at the outset, how his status is to be affected by further self-incriminating disclosures. In this connection, Judge Knapp took note of recent opinions in this district and Circuit casting doubt on the legality of a post-indictment waiver of counsel*, and cited the Supreme Court's more recent decision in Faretta v. California

* United States ex rel Lopez v. Zelker (S.D.N.Y. 1972) 344 F.S. 1050, aff'd 465 F. 2d 1405, cert. den. 409 U.S. 1049; and dissent of Judge Friendly in United States v. Massimo (2 Cir. 1970) 432 F. 2d 324, 326.

(1975) 422 U.S. 806, 835, in relation to the warnings which should be imparted to a defendant in a post-indictment situation. The values expressed in those cited authorities were correctly applied by Judge Knapp to the facts of this case and his decision should be affirmed.

1. THE GOVERNMENT'S EVIDENCE
AT THE SUPPRESSION HEARING

a. Satterfield's Arrest and In-
terrogation Prior to Arraign-
ment.

The appellee Satterfield was indicted on April 14, 1976, in the Southern District Court along with two other defendants (Ronald Weston and James Arnold Byrd) upon a charge of conspiracy to distribute narcotic drugs and three related substantive counts (A1-A5). Satterfield was arrested on this indictment two day later, at about 10 a.m. on Friday, April 16, 1976 (A27; A31). Satterfield, a free-lance tennis instructor, was arrested by Drug Enforcement Administration agents who had telephoned him for "lessons" and had arranged to meet him near the tennis courts at the Fifth Avenue Armory (Agent Fenrich, A63; A71).

The agents placed Satterfield in an automobile and one

of them told appellee what "his rights" were (Agent Kibble, A46-A47). Satterfield immediately "broke down and cried" in the automobile (Agent Kibble, A50). He was "a little upset" and wept intermittently even after arriving at Drug Enforcement Administration headquarters (Agent Kibble, A50). At the headquarters, Agent Coleman tried to speak to Satterfield who kept "crying" and "whimpering" to such a degree that Coleman asked him "What is the problem"? (Agent Coleman, A55). Agent Coleman, who was the group supervisor, could see that Satterfield was "quite emotionally upset" and that he was behaving "like the whole house had fallen down on him" (A57-A58). Because of Satterfield's extreme emotional state, Agent Coleman undertook to be "encouraging" to him (A58).

Coleman testified that Satterfield stated that he knew his rights, and that he told Satterfield he could remain silent and that he had "the right to an attorney" (A55). He told Satterfield generally what the charges were about, that Satterfield was part of an investigation, and that he believed that Satterfield "could provide information to us that would be of value to that investigation" (A55). Satterfield was also told that what he revealed could, and would be, used against him (A55). Satterfield told Agent Coleman that he did not have an attorney and he did not need one "right then" (A56).

Satterfield was kept at Drug Enforcement Administration headquarters from 10:45 a.m. on Friday until he was delivered for questioning to an Assistant United States Attorney in the early afternoon, at perhaps 12:30 p.m. (Agent Fenrich, A66-A67). Appellee was interviewed by Assistant United States Attorney Fortuin starting at about 1:00 p.m. (A137-A141; Exh. 1). The interview lasted until about 1:20 p.m. (id; A141). Satterfield was not arraigned until 3:00 p.m. (A141; Exh. 1).

b. The Proceedings Before the Magistrate.

Upon his arraignment, Satterfield sought the assignment of counsel, but the Magistrate denied the application endorsing on the form that Satterfield was "not eligible" (A136; A25; Exh. 1). Significantly, with respect to filling out the financial affidavit utilized by the Magistrate, Agent Fenrich was called upon for assistance by appellee which the agent gave (Agent Fenrich, A68). Appellee's affidavit showed assets of only \$250. in the bank as against debts and monthly bills far in excess of that figure (Exh. 1; A136).

After his arraignment before the Magistrate, Agent Fenrich told Satterfield that "if he were serious" about his cooperation with the Drug Enforcement Administration, "he should come to our office Monday morning" (Fenrich, A62). Satterfield

said he would be there (A62).

c. Satterfield's Return to Drug
Enforcement Administration
Headquarters on April 19, 1976.

On the following Monday, April 19, 1976, Satterfield appeared at Drug Enforcement Administration headquarters in Manhattan and gave a tape-recorded statement after being warned of his Miranda rights (A144-A147).

II. The Testimony of Satterfield
at the Suppression Hearing.

Satterfield, testifying in his own behalf at the suppression hearing, stated that he had never before been arrested and that he did not understand why the agents had arrested him and taken him away in handcuffs (A71-A72, A73). He began weeping in the agents' car and was "very emotional" throughout his detention and processing at Drug Enforcement Administration headquarters (A73, A75). The agents took his shoes off (A75). He felt "very weak"; "alone"; and his stomach started to act up giving him the feeling of "indigestion" and a need "to go to the bathroom" (A76). He wanted an attorney (A79). He was distraught and so harried that the agents themselves were trying to calm him down (A89).

The day before his arrest, he had received a telephone call at the Armory for a tennis lesson to be given the next morning (April 16, 1976), and when he showed up to give the lesson, the caller - who was a Drug Enforcement Administration agent - and other agents arrested him (A71). The agents said he was being picked up for questioning and he did not know then that he was indicted (A71-A72). Once in the agents' vehicle, they started to ask him questions about one of the other defendants in the instant case, Weston, but no warnings were given to him that he could recall (A72-A73).

At Drug Enforcement Administration headquarters he was also very distraught, nervous, and he did not intend to waive any of his rights (A76-A77; A86). He had no recollection of being warned then of his rights, nor did he tell anyone that he did not want an attorney (A78-A79). In fact, he was interested in having an attorney, although he did not ask for one at that time (A80; A95).

When brought before the Magistrate, he sought to have an attorney assigned to him (A80-A81). When arrested, however, all he had on his person was "about \$25" (A59). He had no money to hire a lawyer (A81).

From speaking with the agents, he knew that he could be

released that day, and he could tell that it was "up to them" whether he would be set free (A82; A89). The agents told him his role "was small" and that if he helped them out, he could be released on a personal bond which the Magistrate did, in fact, permit (A89). When the Magistrate turned down his request for an attorney, however, he felt "left out in the cold" (A82).

Later on, but before leaving the United States Courthouse, Agent Fenrich told him "to come down to the Drug Enforcement Administration office on Monday ... to discuss what you could do for us" (A83). Satterfield thought that showing up at the Drug Enforcement Administration on Monday was obligatory; "part of the procedure" (A84; A86).

Over the weekend, he was unable to raise money for a lawyer (A84). Therefore, on Monday, April 19, 1976, he did go to the Drug Enforcement Administration headquarters and spoke with the agents (A85). Later that week, he spoke to a friend in the police department who, after looking at a copy of the indictment, told Satterfield to "get myself a lawyer" (A85). Later, in June, he was able to retain counsel (A85; A6 docket sheet; A102).

POINT

THE ORDERS OF THE TRIAL
COURT SUPPRESSING APPELLEE'S
POST-INDICTMENT STATEMENTS
MADE IN THE ABSENCE OF COUNSEL
SHOULD BE AFFIRMED.

Following his indictment upon serious felony charges relating to traffic in drugs, appellee -- a novice in matters relating to the law -- was arrested by agents of the Drug Enforcement Administration. The arrest took place in Manhattan, on a weekday, and at an hour (10:00 a.m.), when the court was actually in session and judicial personnel, as well as Legal Aid attorneys were available for an arraignment either before a District Judge or Magistrate. The facts reveal, however, that appellee was not brought before a Magistrate until about 3:00 p.m. -- after three separate incriminating debriefings without counsel had already taken place at the hands of agents of the Drug Enforcement Administration at their 57th Street offices, and an Assistant United States Attorney charged with appellee's prosecution, in the latter's own office.*

Upon his arraignment and application for the assignment of counsel, the Magistrate found appellee to be ineligible-

* See United States v. Duvall (2 Cir. 1976) 537 F.2d 15, 21-22; United States v. Marrero (2 Cir. 1971) 450 F.2d 373, 379 (concurring opinion of Chief Judge Friendly). The deliberate detour to the office of the prosecutor, in order to extract a statement from Satterfield, constituted an unlawful delay in arraignment.

notwithstanding Satterfield's affidavit showing virtually no assets as against debts and obligations considerably exceeding his trivial cash position. Except for a few dollars, appellee had no other assets*-- or even an automobile (A136).

Upon his release, appellee was advised, or encouraged, by a Drug Enforcement Administration agent to return to see him right after the weekend, and this the appellee did without the aid of counsel -- elaborating then, on tape, the further details of his involvement in the case. Against this background, and after a full hearing during which appellee himself testified, Judge Knapp granted the motion to suppress Satterfield's post-indictment statements to the agents of the Drug Enforcement Administration on April 16, 1976, and April 19, 1976, and his statement to the United States Attorney prior to arraignment on April 16, 1976. Judge Knapp, in his original memorandum, also concluded that the appellee's mental state following his arrest was so deteriorated that he was incapable of comprehending the Miranda warnings (384 U.S. 436) which had allegedly been given to him (A160-A161). Upon the Government's later motion for reargument, however, Judge Knapp abandoned his findings on that score, found Satterfield's waiver knowledgeable, but continued to suppress all statements of appellee upon the view that Satterfield

* Satterfield had about \$25 in cash at the time of his arrest.

purported waiver of counsel after indictment was ineffectual in the absence of stronger and more detailed warnings such as would have validated a waiver of counsel in open court (A186-A187; A165).

The precise memorandum and order of Judge Knapp in its final revised form requires little, if any, amplification (A158-A166; A186-A187). The principles underlying it do, however, justify some discussion challenging the view of the Government on this appeal that an indicted defendant need not be brought immediately to court for arraignment, and that he may first freely be interrogated after his arrest, without the intercession of any counsel; and that disclosures made then are admissible so long as the indicted defendant has first received his Miranda warnings.

In a case involving similar considerations to those at issue here, District Judge Frankel, as long ago as 1972, drew heavily upon the dissenting opinion of the New York Court of Appeals in People v. Lopez, 28 N.Y. 23, 26-29, in concluding that a defendant, once indicted, may not effectively waive his right to counsel except in the presence of counsel and with the acquiescence of counsel (United States ex rel Lopez v. Zelker [D.C.S.D.N.Y. 1972], 354 F.S. 1056; *affd* w/o op. 465 F2d 1405, cert. den. 409 U.S. 1049). In so ruling, Judge Frankel observed that an indicted defendant, under the

"basic principle of Massiah v. United States, 377 U.S. 201", is entitled to representation by counsel and that a statement taken from him in the absence of counsel would be inadmissible except in special circumstances. Even assuming that the right to counsel could be waived, Judge Frankel flatly interdicted the usual "Miranda-style waiver" as a competent means for the sacrifice of a right otherwise guaranteed by the Sixth Amendment (344 F.S. 1050, 1054). The District Court in the instant case shared Judge Frankel's strongly expressed concern that, after indictment, the viable options available to a defendant, acting without legal guidance in seeking to influence the outcome of his case, are very materially reduced. The plea-bargaining thicket is simply too dense a medium for the uncounseled defendant to maneuver in when ranged against hostile and more experienced forces. In this connection, Judge Frankel wrote, at p. 1054:

"When an indictment has come down riveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation and understanding of what is being given up. There is no longer the possibility -- and the law enforcement justification -- that a mere suspect may win his freedom on the spot by 'clearing up a few things.' Cf. United States v. Drummond, 354 F2d 132, 144 (2d Cir. 1965) (en banc), cert. denied, 384 U.S. 1013,

86 S. Ct. 1968, 14 L.Ed.2d 1031 (1966), rehearing denied, 385 U.S. 892, 87 S.Ct. 24, 17 L.Ed.2d 126 (1966). Even in the courtroom where an impartial judicial officer is presumably impelled by no purpose but fairness, that officer must counsel with care and advise against the likely folly of a layman's proceeding without the aid of a lawyer. *Von Moltke v. Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L.Ed. 309 (1948); *United States v. Spencer*, 439 F.2d 1947 (2d Cir. 1971); *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964). See *United States v. Duty*, 447 F.2d 449, 451 (2d Cir. 1971). We cannot settle for less where the waiver has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody."

The decision in the Lopez case, as indicated, was affirmed by this court, albeit without opinion. Judge Frankel's reasoning, while now said by the Government to be open to some doubt insofar as precedent is concerned, appears to us to be unassailable and life-giving insofar as the concepts which the Sixth Amendment is meant to nourish. The path hacked out by the District Court in Lopez is the only track sufficient to ensure that a defendant -- otherwise entitled to counsel -- is granted the full benefit of that vital right in a meaningful way. To enforce a Miranda type waiver against an indicted defendant in circumstances where he is kept ignorant of the means by which his silence, or "co-operation", can be utilized in his own favor, is to rob

from the defense the single most valuable advantage that timely counseling could provide. The utter disparity in consideration for what the uncounseled defendant gives up by his unrewarded confession is also repelling to any concept of fair dealing. The defendant gives up all and receives naught -- a pillage pure and simple.*

The unseemliness of such maneuvering by a Government scheming to keep a defendant orphaned from his, or any, counsel is very well described by Judge Breitel in his excellent dissent in People v. Lopez which supplied the essential logic for Judge Frankel's decision in United States ex rel Lopez v. Zelker, supra. In Lopez (28 N.Y. 2d 23, 28-29) Judge Breitel, also speaking to the question of the validity of any post-indictment waiver by an unrepresented defendant, wrote:

"Whatever vitality a waiver rule might have under the Miranda doctrine, other considerations require a contrary rule in the area of post-arraignment and post-indictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery;

*An indicted defendant represented by counsel, on the other hand, achieves advantages which result in a disparity of final treatment for which the law can offer no explanation acceptable to the average person.

it is no longer a suspect who is being interrogated but the accused; the interest in affording the police an opportunity to carry on investigatory interrogation for purposes of reaching a decision to charge and in what degree is diminished. In short, the defendant is the all but irrevocable target and the preparation for his trial has begun.

In permitting a theory of waiver of counsel by an uncounselled defendant held incommunicado to be imported into this stage of the proceedings, not only is the right to counsel debased or negated, but perhaps even worse, the self-restraining and wise self-discipline of stare decisis is trod under by distinctions of gossamer thinness and transparency.

Putting aside jurisprudential principles, the practical effect is unfortunate. It seems elementary that in the protection of individuals (even in civil matters, let alone in criminal matters) waivers obtained in a pending action in the absence of counsel are, in truth, a denial of the right to counsel in that action. The denial is the more egregious where counsel is already retained or assigned, but the frustration of the right may be as grave if the waiver comes on the very eve of the inevitable retainer or assignment of counsel as is now the case in criminal actions. Lip service is paid to the right, to be sure, and counsel will be provided, but not until persons, already defendants in criminal actions, have first confessed under the most transparently manipulated 'voluntary' waivers of 'known rights.' Surely, if Mr. Justice Jackson was right that no lawyer worth his salt would advise a suspect to talk without counsel present, no lawyer would permit his client in a criminal action to confess in the lawyer's absence." (Emphasis added.)

Judge Breitel's dissent in Lopez has had a vitality sufficient finally to overcome the contrary majority opinion in that case as will be seen from the recent (May 4, 1976) New York Court of Appeals decision in People v. Hobson, 39 N.Y. 2d 479. In Hobson, the New York Court of Appeals, in an opinion by Judge Breitel held, with five other judges, that People v. Lopez has been "overruled in principle" (39 N.Y. 2d 479; 384 N.Y.S. 2d 419, 426). It seems clear, therefore, that in the New York courts an uncounseled waiver of counsel after indictment is no longer allowable -- without regard even to the quality or detail of the warnings given as a prelude to a purported waiver.* While Judge Knapp, in the instant case, does not follow this extreme view, his decision does track the minority reasoning in People v. Lopez, and in Hobson, supra, and makes a most persuasive argument that the simple iteration of a Miranda warning is insufficient to serve the rights and needs of an already indicted defendant. Judge Knapp's decision below, thus, to our present satisfaction goes far enough to preclude the use of appellee's statements in the trial of the instant case.

Judge Knapp's additional reliance upon the decision of the United States Supreme Court in Faretta v. California, 422, U.S. 806, 835 is also well placed. In that case, the

* In New York "the mere requesting of counsel is sufficient to render defective any further questioning by police as to the crime with which the defendant is charged" (People v. Dugan [3d Dept. 1976] 386 N.Y.S.2d 257, 259) [emphasis added].

Supreme Court dealt with the question of whether a defendant indicted in a state court, who wished to conduct his own defense, could be compelled to proceed with assigned counsel. In deciding that Faretta could choose to conduct his own defense, the Supreme Court dealt with the question of a defendant's right to waive counsel after indictment by stating that:

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forego those relinquished benefits. Johnson v. Zerbst, 304 U.S. 458, 464-465. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Adams v. United States ex rel. McCann, 317 U.S. 269, 270." (Emphasis added.)

Certainly, the warnings allegedly given to appellee after indictment in the instant case in no way attempted to make him aware of the "dangers and disadvantages of self-representation" referred to in the Faretta case. Having been indicted, appellee was clearly entitled to counsel, but in allegedly

being willing to proceed, he had embarked upon a course of "self-representation" within the meaning of Faretta. Obviously, when one acts without counsel, he is necessarily involved in self-representation. Such representation in this case never met the threshold requirements set forth in Faretta regarding prior announcement of the "dangers and disadvantages" of being one's own counsel and thus the naked, curt, Miranda warnings given to this weeping and confused defendant after his arrest failed completely in their purpose.

The view expressed in Faretta was earlier echoed by a member of this court in his dissent in United States v. Massimo (2 Cir. 1970) 432 F. 2d 324. There, now Chief Judge Friendly observed as to a defendant who had given a written statement after indictment in the absence of counsel, that conventional Miranda warnings should not suffice to authorize the admissibility of such statement. In this connection, Judge Friendly wrote (at p. 327):

"Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion would not necessarily meet what I regard as the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached. See United States ex rel. O'Connor v. New Jersey 405 F2d 632, 636 (3 Cir.), cert. denied 395

U.S. 923, 89 S.Ct. 1770, 23 L. Ed. 2d 240 (1969); contra, *Coughlan v. United States*, 391 F.2d 371 (9 Cir.), cert. denied, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968); *United States v. DeLoy*, 421 F.2d 900 (5 Cir. 1970). Indeed, in the case of a federal trial there would seem to be much ground for outlawing all statements resulting from post-arraignment or indictment interrogation (as distinguished from volunteered statements) in the absence of counsel when the questioning has no objective other than to establish the guilt of the accused, even if the Sixth Amendment does not require so much. See *Ricks v. United States*, 118 U.S. App.D.C. 216, 334 F.2d 964 (1964)."

The Massimo affirmance does not at all undercut the force of Judge Friendly's minority observations, since the Massimo majority never reached the Massiah issue because defense counsel never formally objected at trial to the admission into evidence of Massimo's statement. Indeed, defense counsel there stipulated the statement into evidence; an action interpreted by the majority on appeal as an intentional maneuver calculated to serve a particular defense strategy relating to lack of mental responsibility.

Insofar as the Government's brief undertakes to suggest that other recent cases in this Circuit support its position on this appeal, such a contention simply cannot withstand analysis. Thus, while the Government's brief (pp. 9-10) cites United States v. Barone, (467 F.2d 247), in that case the

defendant actually spoke to his attorney by telephone just before making a statement and therefore had access to counsel and was in a position to act under advice. This is a distinction which Judge Knapp was careful to note (A163).

Similarly, the Government's reference to United States v. Diggs (2 Cir. 1974) 497 F.2d 391, (br. pp. 10-11) is also inappropriate, for in that case the defendant gave his statement prior to indictment, after several explicit warnings. The Government's reliance on United States v. Hall (2 Cir. 1975) 523 F.2d 665 (br. p. 12) also falls wide of the mark for the same reason: -- Hall gave his statement prior to indictment. And, insofar as the Government cites United States v. Reed (2 Cir. 1975) 526 F.2d 740 (br. p. 12), it is quite clear that counsel on appeal in that case never raised the Massiah issue but merely questioned the form of the Miranda warnings which were given.

The brief of the Government (p. 13) also recites a string of out-of-circuit cases dealing with pre-indictment waivers which, obviously, are irrelevant and require no discussion. However, the Government's brief mentions, without any discussion (br. p. 13) the very pertinent decision of the Court of Appeals for the Third Circuit in United States

ex rel O'Connor v. State of New Jersey (1969) 405 F.2d 632; cert. den. 395 U.S. 923. This important case is also cited in Judge Friendly's dissenting opinion in the Massimo case, supra. In the O'Connor case, the defendant's post-indictment statements made in the absence of counsel were held by the Court of Appeals to be inadmissible under the rule of the Massiah case. In so ruling, the prosecution's claim that no deception was used in gaining the statement was swept aside as meaningless, the key feature of the case being the fact that O'Connor had already been indicted when his uncounseled statements were procured (405 F.2d 632, 636, citing McLeod v. Ohio 381 U.S. 356). While the Government on this appeal attempts to pursue the same discredited argument, seeking to relegate Massiah to a special limbo sounding in governmental deceit, the language of cases decided in the Second Circuit indicates that the rule in Massiah is not restricted to its narrow facts. Indeed, in United States v. Garcia (2 Cir. 1967) 377 F. 2d 325, 328, this court stated that Massiah:

"protects against deliberate efforts of law enforcement agents which are specifically aimed at eliciting incriminating statements relative to the crime under indictment."

Certainly, the questioning of appellee Satterfield by Drug Enforcement Administration agents and the prosecutor in charge

of this case was exactly of the sort described in the Garcia case as coming within the rule stated in Massiah. The Government's additional reference to United States v. Barone [(2 Cir. 1972) 467 F. 2d 24,, is also not appropriate since that case did involve the intervention of counsel. Nor is United States v. Accardi [(2 Cir. 1965) 342 F. 2d 697] relevant since in that case the statements of the defendant were spontaneous, volunteered, and were not in response to any interrogation.

Judge Knapp's decision and opinion appears, therefore, to be based upon considerations which stand untouched on any of the legal or analytical grounds advanced by appellant. There is, therefore, absolutely no reason why this court should reject the trial court's well reasoned views and conclusions.

CONCLUSION

The orders of the trial court should be affirmed insofar as they direct the suppression of appellee's post-indictment statements.

Respectfully submitted,

Lawrence K. Feitell
Attorney for the Appellee
Reginald Satterfield

October, 1976

A 202 Affidavit of Personal Service of Papers
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,
Appellant,

- against -

REGINALD SATTERFIELD,
Defendant- Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Reuben A. Shearer *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030
That on the 6th day of October 1976 at One St. Andrews Plaza, New York, New York
deponent served the annexed Brief upon

Robert B. Fiske Jr
the Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this ~~5th~~ 6th
day of October 19 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer
Reuben Shearer

